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No. 87-1083

In the Supreme Court of the United States

October Term, 1987

AVIS RENT-A-CAR OF PUERTO RICO, INC.,
PETITIONER,

v.

JOHN G. MARSHALL, ET ALS,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
Statement of the Case	1
Preliminary Statement	1
Counterstatement of Facts	2
Proceedings Below	2
Argument	3
I. That Pursuant to the Seventh Amendment of the United States Constitution, in Diversity Actions Such as This Brought in the Federal District Court of Puerto Rico, the Issue of Causation Was Properly Submitted to the Jury for Determination	3
II. That the Denial of the Directed Verdict Was Proper, as Reasonable Persons (Juror or Judge) Could Differ on the Issue of Adequate Causation	6
Conclusion	7

TABLE OF CITATIONS

Cases

Byrd v. *Blue Ridge Rural Electrical Cooperative, Inc.*, 356 U.S. 525 (1958)	4, 5
Christopherson v. *Humphrey*, 366 F.2d 323 (10th Cir. 1966)	4
Hanna v. *Plumer*, 380 U.S. 460 (1964)	6
Hurwitz v. *Hurwitz*, 136 F.2d 796 (D.C. Cir. 1943)	6
In Re N-500L Cases, 517 F. Supp. 821 (D.C. P.R. 1981)	4
LaForest v. *Autoridad de las Fuentes Fluviales de Puerto Rico*, 536 F.2d 443 (1st Cir. 1976)	5, 6
Molinar v. *Western Electric Company*, 525 F.2d 521 (1st Cir. 1975)	4
Parson v. *Bedford*, 28 U.S. (3 Pet.) 433 (1830)	4, 5

Page

Rivera v. *Central Pasto Viejo, Inc.*, 44 P.R.R. 236 (1932) 5
Simler v. *Connor*, 372 U.S. 221 (1963) 4
Valle v. *American International Insurance Co.*, 108 P.R.R. 735 (1979) 5
Wright v. *Paramount-Richards Theatres*, 198 F.2d 303 (5th Cir. 1952) 5

United States Constitution

Seventh Amendment 3, 4, 5

Statutes

Title 31 Laws of Puerto Rico Annotated, Sections 5141-5149, Articles 1802-1810 Puerto Rico Civil Code 5

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Statement of the Case

Preliminary Statement

This is a diversity action brought by John G. Marshall, his wife, and two minor children for near fatal and permanent physical injuries caused when defendant/petitioner, Avis Rent-A-Car of Puerto Rico, Inc. ("Avis"), rented a vehicle to Mr. Marshall which had an improperly maintained, worn and leaking rear left tire. The accident occurred when the referenced tire went flat, causing Marshall to have to get out of the vehicle, where he was struck by another vehicle driven by codefendant Jose E. Perez Arzuaga.

Counterstatement of Facts

On August 23, 1982, Marshall and his wife rented a vehicle at the Avis Terminal facilities located near the Luis Munoz International Airport in San Juan, Puerto Rico. Several days later while driving the vehicle he hit a pothole, causing the right front tire to go flat. He changed the flat tire and replaced it with a "balloon" spare tire and returned to the Avis facility for a replacement. Avis service personnel changed both front tires but not the rear ones which were original equipment, having been on the car for over nine months and 15,000 miles. The evidence at trial established that a proper inspection of the rear tires, rather than the cursory inspection conducted by Avis personnel, would have revealed that the rear left tire was worn and leaking air.

Soon after Marshall departed the rental facility, he felt the car commence to vibrate. After traveling a distance of approximately 200 yards, he stopped on the far right side of the right-hand exit lane. The distance traveled from the Avis facility was less than a mile. After checking for oncoming traffic, Marshall exited the Avis vehicle. When he reached the rear left tire, he noticed that it was flat. He then kicked the tire, swore and turned to walk back to the door. He was immediately struck by a passing vehicle driven by Jose E. Perez Arzuaga. In addition to suing the passing motorist, Marshall brought suit against Avis for having negligently provided him with a vehicle equipped with an improperly maintained, worn, and leaking tire, thereby putting him at risk of an injury of the type which occurred.

Proceedings Below

At the conclusion of the presentation of Marshall's case, Avis moved for dismissal of the complaint. The District Court denied Avis' motion. After the presentation of defendant's case, Avis again renewed its motion to dismiss and it was again denied. Following seven days of trial, the case was allowed to

go to the jury. The jury returned a verdict for plaintiffs, fixing Avis' responsibility for the accident at 40% and that of the passing motorist at 60%. Total damages were awarded in the amount of $750,000. Subsequent motions by Avis for judgment n.o.v., or alternatively for a new trial, were denied. (A-23).[1] The trial judge, in denying the motions, found that there was "sufficient evidence in the record from which the jury could have reasonably found as they did." (A-26). On appeal to the First Circuit Court of Appeals, the judgment of the District Court was affirmed (Judge Torruella dissenting). (A-1). A petition for rehearing and suggested rehearing en banc was likewise denied. (A-22). Avis now petitions this Court for a writ of certiorari.

Petitioner raises essentially two arguments before this Court. Petitioner argues for the first time that notwithstanding the Seventh Amendment, this case should have been tried without a jury. Avis also argues that the denial of the directed verdict should be reversed as no reasonable juror (or Judge) could have found adequate causation. These arguments will be addressed separately.

Argument

I. That Pursuant to the Seventh Amendment of the United States Constitution, in Diversity Actions Such as This, Brought in the Federal District Court of Puerto Rico, the Issue of Causation Was Properly Submitted to the Jury for Determination.

Succinctly stated, the issue which petitioner now raises for the first time is whether the Seventh Amendment right to trial by jury applies to civil actions brought under diversity jurisdiction in the District Court of Puerto Rico. The argument advanced is simply that, "Neither Puerto Rico's Constitution nor its laws recognize nor provide for trial by jury in civil

[1] References are to the appendix contained in the petition for writ of certiorari filed by Avis.

cases." Therefore, according to Avis, not only the issue of causality, but presumably the entire case, should have been decided by the trial judge. This argument was first raised in the dissenting opinion of Appellate Judge Torruella, who after noting that "causation—whether it be a question of fact, law or both—is for the judge to resolve in a civil law jurisdiction" (A-18), went on to state, "The point is that if this tort case had been litigated before a judge in the local courts the outcome could well have been different". (A-19). Though not specifically stated, it is suggested by Judge Torruella's dicta that the Seventh Amendment right to trial by jury in civil diversity cases brought in federal court, does not exist in Puerto Rico.[2]

The Seventh Amendment of the United States Constitution provides that:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved..."

To argue that the issue of foreseeability (and presumably all liability issues, including damages) should have been decided by a judge and not a jury, simply because Puerto Rico never uses juries in civil cases, is to ignore that in diversity cases as in other cases, the right to trial by jury in federal courts is to be determined as a matter of Federal law. *Simler* v. *Connor*, 372 U.S. 221, 222 (1963); *Byrd* v. *Blue Ridge Rural Electrical Cooperative, Inc.*, 356 U.S. 525, 533-40 (1958); *Molinar* v. *Western Electric Company*, 525 F.2d 521, 527 (1st Cir. 1975); *Christopherson* v. *Humphrey*, 366 F.2d 323 (10th Cir. 1966).

This court, as far back as *Parson* v. *Bedford*, 28 U.S. (3 Pet.) 433, 446 (1830), has expressed that the "common law" as contained in the Seventh Amendment, includes not merely suits recognized under traditional notions of common law, but suits "in which legal rights were to be ascertained and determined".

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[2] But cf. *In Re N-500L Cases*, 517 F.Supp. 821, 823-824 (D.C. P.R. 1981) where then U.S. District Judge Torruella reached the opposite conclusion.

In Puerto Rico the "common law" referred to in the Seventh Amendment is the civil law as contained in the Civil Code of Puerto Rico. It is precisely the Civil Code which provides Puerto Rico's substantive law on tortious liability. Title 31 Laws of Puerto Rico Annotated, Sections 5141-5149, Articles 1802-1810 Puerto Rico Civil Code; *Valle* v. *American International Insurance Co.*, 108 P.R.R. 735 (1979); *Rivera* v. *Central Pasto Viejo, Inc.*, 44 P.R.R. 236 (1932).

It has been held that "civil plaintiffs in the federal district court of Puerto Rico are entitled under the seventh amendment to a trial by jury." *LaForest* v. *Autoridad de las Fuentes Fluviales de Puerto Rico*, 536 F.2d 443, 446 (1st Cir. 1976). The same conclusion has been reached in Louisiana, which like Puerto Rico is a civil law jurisdiction. There, it has been consistently held that the Seventh Amendment requires trial by jury in the Louisiana equivalence of common law actions, when the action is brought in the federal district courts of Louisiana by reason of diversity jurisdiction. *Wright* v. *Paramount-Richards Theatres*, 198 F.2d 303 (5th Cir. 1952).

Puerto Rico's requirement of having issues of fact, law or both, determined by a judge and not a jury, is not a "rule intended to be bound up with the definition of the rights and obligations of the parties." *Byrd* v. *Blue Ridge*, at 536. Rather it merely fixes a historical form or mode of reckoning. As has been noted by this Court, "The [Seventh] amendment thus may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the particular form which they may assume to settle legal rights." *Parson* at 446.

Petitioner adopts Judge Torruella's statement in his dissent that the construction of the majority of the Court of Appeals leads to the "deep pocket" theory of recovery and converts Avis into an insurer. As correctly noted by Chief Judge Campbell in the majority opinion:

> But we have held before that this disparity in damages awards in the federal courts and in the commonwealth courts is insufficient to warrant a deviation from the principles of federal common law. See LaForest, 536 F. 2d at 446-47 (applying federal standard for review of jury verdicts). Cf. Hanna v. Plumer, 380 U.S. 460, 466-67 (1964) (" 'Outcome-determination' analysis was never intended to serve as a talisman.") (A-9)

Petitioner voiced no objection regarding the substantive law instructions on proximate cause or causality which were given to the jury. Neither did it object that the instructions were given to the jury in the first place. Avis did not raise the jury challenge prior to the commencement of the trial, at the conclusion of the plaintiff's case, nor prior to the submission of the case to the jury. It was not raised in any post-trial motions, nor was it raised in any brief filed before the Court of Appeals. As we have noted previously, the issue was first raised in dicta by the dissenting Appellate Judge. Avis' failure to interpose a timely objection constitutes a waiver, or in the alternative, the submission of the case to the jury for determination of the issue of causality, is a harmless error. *Hurwitz* v. *Hurwitz*, 136 F.2d 796, 799 (D.C. Cir. 1943).

II. That the Denial of the Directed Verdict Was Proper, as Reasonable Persons (Juror or Judge) Could Differ on the Issue of Adequate Causation.

Whether determined by a jury or by a judge, the issue is still the same. Avis should have reasonably foreseen that by renting a car with an improperly maintained, worn, and leaking tire, it exposed Marshall to the risk of the injuries which he suffered. It is petitioner's contention that Avis could not have reasonably foreseen that by providing Marshall with an improperly maintained, worn, and leaking tire, it placed him at risk of an accident of the type that occurred. As noted by the

Court of Appeals, this position "is tantamount to saying reasonable people could not differ on whether Perez' negligent driving was reasonably foreseeable." (A-10). We do not believe that petitioner's argument needs to be scrutinized beyond noting that in denying Avis' motion for judgment n.o.v., the trial Judge, "a member of the Puerto Rico Bar and, formerly, of its judiciary" (A-10 at Note 7) found that there was "sufficient evidence in the record from which the jury could have reasonably found as they did." (A-26).

Conclusion

In view of the foregoing, respondents respectfully submit that the petition for writ of certiorari be denied.

Respectfully submitted,

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